Puyallup Tribe of Indians

October 1, 2020

Via Certified Mail, Return Receipt Requested

Electron Hydro, LLC
1800 James Street, Suite 201
Bellingham, Washington 98225

Thom A. Fischer
613 Linden Road
Bellingham, Washington 98225

Chris Spens
2877 Lake Whatcom Blvd
Bellingham, Washington 98229

Tollhouse Energy Company
1800 James Street, Suite 201
Bellingham, Washington 98225

Wilbur Ross, Secretary
U.S. Department of Commerce
1401 Constitution Ave., N.W.
Washington, D.C. 20230

Corey Alefteras
16417 Sundance Ave SE
Yelm, Washington 98597

Electron Management, LLC
1800 James Street, Suite 201
Bellingham, Washington 98225

Electron Holdings, Inc.
1800 James Street, Suite 201
Bellingham, Washington 98225

David L. Bernhardt, Secretary
U.S. Department of the Interior
1849 C Street N.W.
Washington, D.C. 20240

Re: Notice of Intent to Sue for Violations of Endangered Species Act

Dear Sirs:

I am writing to inform you of the Puyallup Tribe's intent to file a citizen suit against Electron Hydro, LLC, Electron Management, LLC, Tollhouse Energy Corp., Electron Holdings, Inc., Thom A. Fischer, Corey Alefteras and Christopher Spens for ongoing violations of the federal Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544. Electron Hydro LLC, Thom A. Fischer, Chris Spens, Corey Alefteras, Electron Management, LLC, Electron Holdings, Inc., and Tollhouse Energy Company (collectively "Electron"), as owners, managers, administrators, or financiers of the Electron Dam on the Puyallup River in Washington, have authorized, approved, or otherwise undertaken, and continue to authorize, approve, or undertake, operations of the dam and related facilities and specific actions during construction of improvements to the facility in 2020 that have resulted in and will continue to result in the illegal take of Chinook salmon, steelhead and bull trout in the Puyallup River.

The Puyallup Tribe is a federal recognized Indian tribe, with its reservation in and near Tacoma, Washington. The Puyallup River runs through the Tribe's Reservation for 7 miles of the river's length downstream of the facility. The Tribe owns the bed and the banks of the Puyallup River and regulates the water quality of the River under its jurisdiction for the length of the river within its reservation. The Tribe depends upon the fish and other natural resources in the River and has a Treaty Right to fish the waters of the Puyallup River and other surrounding waters of the Tribe's usual and accustomed fishing areas. The Puyallup Tribe works through hatchery operations and research on both wild and hatchery stocks to improve and recover salmon runs including species listed as threatened under the Endangered Species act.

The Tribe is not only outraged by the intentional and continued take of listed species by Electron but the continued take of listed species directly impacts the Tribe, tribal members, the Tribe's resources, the listed and non-listed fish upon which the Tribe and its member rely, the Tribe's cultural resources, and the Tribe's Treaty Rights. The Tribe is gravely concerned about the continued take of listed species and the impacts of the continued take on the long term success of these runs of fish. In just the actions this year, Electron has wiped out an entire run of salmon for this year.

Eight anadromous fish populations inhabit the Puyallup River watershed, including Chinook, coho, chum, pink, and sockeye salmon, and steelhead, bull and sea-run cutthroat trout. Historically, the Puyallup River watershed supported approximately 42,000 Chinook salmon. In 1999, the National Marine Fisheries Service ("NMFS") listed Chinook salmon in Puget Sound, including in the Puyallup River, as threatened with extinction under the ESA. 64 Fed. Reg. 14308, 14313 (March 24, 1999). In 2007, NMFS adopted a Recovery Plan for Chinook. The Recovery Plan notes that, as of 2007, escapement of Chinook in the Puyallup River watershed (including early/spring returns to the White River) was estimated to be 1,300 fish. Chinook smolts and juveniles outmigrate throughout the year, with the peak outmigration in May to June.

Historically, the Puyallup River watershed supported approximately 6000 steelhead trout. In 2007, NMFS listed steelhead trout in Puget Sound, including in the Puyallup River, as threatened with extinction under the ESA. 72 Fed. Reg. 26722 (May 11, 2007). Steelhead trout typically spend two years in the Puyallup River or its tributaries before outmigrating and may spend one to four years at sea. Steelhead trout outmigrate throughout the year, with peak outmigration occurring from March to July. Steelhead are at a critical low number in their population where the smallest decline could reach a low point there extirpation is certain.

Historically, the Puyallup River watershed supported bull trout, though historic estimates are lacking. In 1999, the Fish and Wildlife Service ("Service") listed the populations of bull trout in the Coastal/Puget Sound region in Washington, including in the Puyallup River, as threatened with extinction under the ESA. 64 Fed. Reg. 58910 (Nov. 1, 1999). These bull trout populations include fluvial/resident bull trout and an anadromous form of bull trout. 69 Fed. Reg. 39951 (July 1, 2004). The Puyallup River is one of eight "core areas" for bull trout in the Puget Sound region, and a local population of bull trout exists in the upper Puyallup River, where higher elevations produce the cool temperatures they require. Bull trout in the Puyallup River migrate

throughout the river throughout the year. In 2004, the Service issued a draft Recovery Plan for the Coastal/Puget Sound bull trout. 69 Fed Reg. 39950-51 (July 1, 2004). The draft Recovery Plan states that the abundance target for bull trout in the Puyallup River is 1000 adults. By contrast, as of 2004, the bull trout population totals fewer than 100 adults.

The Electron Project:

Puget Sound Power & Light Company began building the Electron Hydroelectric Project in 1902 and finished it in 1904. The project is located on the Puyallup River in the foothills of Mount Rainier, about 42 miles southeast of Seattle, near Kapsowin in Pierce County. Because the Puyallup River originates in glaciers on Mount Rainier, and its gradient in the project area is relatively steep, the river conveys significant bedload and sediment in the area. Rainfall at Electron Dam averages 70 inches annually.

The Electron Dam includes a timber crib dam at river mile 41.7 that is ten feet high and has a crest length of approximately 200 feet. The dam can divert up to 400 cubic feet per second ("cfs") of water through a 62.5-foot wide intake into a large (10-foot by 8-foot) wooden flume The mean amount of water diverted is typically 350 cfs, and mean annual flow of the Puyallup at the diversion dam is 527 cfs, so the dam can divert a significant majority of Puyallup River flow.[1]

The flume is 10.1 miles long. Roughly four miles downslope from the diversion dam, the flume opens up into a settling basin ("Lizard Lake") that Electron periodically dredges to remove sand and silt. Ultimately, the flume empties into a 124 acre-foot forebay at an elevation of 1500 feet. Four penstocks convey water from the forebay into a powerhouse at an elevation of 667 feet. Water then returns to the Puyallup at river mile 31.2.

When the Electron Dam was built, it did not include facilities allowing salmonids to migrate above it to reach historic habitat. As a result, for nearly 100 years, the dam blocked access to approximately 26 miles of historic fish habitat in the mainstem and 10 miles in tributaries, some of which is the most pristine and productive fish habitat in the Puyallup River watershed. Beginning in 1997, the Puyallup Tribe outplanted Chinook salmon into acclimation ponds upriver from the Electron Dam. These adult fish spawned and their smolts outmigrated, returning 3-5 years later. In 2000, to enable adult and other migratory fish to migrate above the dam, a roughly 215-foot-long fish ladder was built alongside the dam opposite the flume intake. Today, Chinook salmon and steelhead and bull trout and coho migrate upstream of the dam using the ladder, and spawn above the dam.

When the Electron Dam was built, it did not include fish screens to prevent juvenile fish migrating downstream from spawning areas above the diversion dam from entering the flume.

[1] A minimum instream flow of 80 cfs is required in the bypass reach from July 15 to October 15, when salmon and steelhead trout are migrating upstream. Outside of that period, 60 cfs is required in the bypass reach.

Some fish that enter the flume become subject to dredging in the settling basin. Those that do not end up in the forebay at the terminus of the flume. Currently, there is a barrier net and trap-and-haul facility in the forebay. Depending on the month, a large portion of the fish in the forebay may be fry. Adult fish prey on smaller fish in the forebay. Further, each of the penstocks is covered by a trash rack of steel bars spaced roughly one inch apart. As a result, smaller fish can pass through the trash rack and become entrained in the penstocks or turbines. Further, periodically, Electron or its agents capture, collect, and move Chinook salmon and steelhead and bull trout found in the forebay. Accordingly, fish (including ESA-listed Chinook salmon and steelhead and bull trout) in the forebay are (1) trapped and hauled (not all survive these processes), (2) preyed upon by other fish, (3) die in sand, silt, and turbidity, or (4) become entrained in the penstocks or turbines.

Electron Hydro proposed work for the project this year to replace the diversion dam with a bladder dam that would allow for more efficient diversion of flow. The Tribe ONLY supported this action because Electron Hydro would be required in a subsequent project to screen the intake. The screening was to be installed in two to three years. However, during construction this summer on the bladder dam project, Electron Hydro and its managers, foreman, and owners chose to place an estimated 2400 square yards of discarded artificial turf, which was found at a nearby roadside dump, in the channel to act as some sort of buffer between the native bed material and the liner material they chose to line the bypass channel created during construction. The placement of turf in the Puyallup River, where it remains today more than 65 days later, was not permitted and has resulted in crumb rubber and plastic material being discharged and carried more than 40 miles along the river and out into Commencement Bay. This material will never be fully recovered. In addition, on or around July 29, 2020, and entire section of the turf ripped away and was carried downstream in high flows. It is only a matter of time before the remaining turf is washed away downstream.

In response to the permit violations during construction which include, but are not limited to, the placement of the turf in the Puyallup River, the permitting agencies all issued stop work orders to Electron. Electron was ordered to prepare plan to do the minimum work necessary to secure the site for winter and move the river back over so the turf could be removed. Electron Hydro did not present any plan until September 4, 2020. That plan included construction of a rock dam in the area where the original diversion dam has already been removed before the stop work orders were issued. Electron has been asked to provide additional information and alternatives that represent the minimal work necessary but, to date, has insisted its September 4th plan is the only plan and information available. This delay has increased the risk and harm to fish exponentially every day since the turf was put in the river. The rock dam is a wholly different structure and has not been permitted by any agency at this time.

Background on the ESA:

The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *TVA v. Hill*, 437 U.S. 153, 180, 184 (1978). "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species

extinction, whatever the cost." *Id.* A purpose of the ESA "is to preserve the ability of natural populations to survive in the wild" and "to promote populations that are self-sustaining without human interference." *Trout Unlimited v. Lohn,* 559 F.3d 946, 957 (9th Cir. 2009). In the ESA, "Congress clearly intended that [agencies] give the highest of priorities and the benefit of the doubt to preserving endangered species." *Defenders of Wildlife v. Flowers*, 414 F.3d 1066, 1074 (9th Cir. 2005).

To achieve these goals, the ESA "provides both substantive and procedural provisions designed to protect endangered species and their habitats." *Am. Rivers v. NMFS*, 126 F.3d 1118, 1121 (9th Cir. 1997). Under Section 9 of the ESA, no entity – federal, state, or private – may cause the "take" members of an endangered species. 16 U.S.C. § 1538(a)(1)(B); *Or. Natural Res. Council v. Allen*, 476 F.3d 1031, 1033 (9th Cir. 2007) (Section 9 "establishes a blanket prohibition" on taking). The "take" prohibited by Section 9 need not be the result of purposeful action. *Babbitt v. Sweet Home Chapter, Communities for Greater Or.*, 515 U.S. 687, 704-05 (1995); *Nat'l Wildlife Fed'n. v. Burlington N. R.R.*, 23 F.3d 1508, 1509 (9th Cir. 1994). "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Each of these enumerated, prohibited acts has independent meaning. *Babbitt*, 515 U.S. 697-98; *Animal Welfare Institute v. Martin*, 588 F.Supp.2d 70, 98 (D. Me. 2008).

The prohibition against "take" applies to "one or more" members of a protected species. *Or. Natural Desert Ass'n v. Tidwell*, 716 F. Supp. 2d 982, 1005 (D. Or. 2010) (citing *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 2000)). "[T]he Act does not distinguish between a taking of the whole species or only one member of the species. *Any taking and every taking* – even of a single individual of the protected species – is prohibited by the Act." *Loggerhead Turtle v. County Council*, 896 F. Supp. 1170, 1180 (M.D. Fla. 1995) (emphasis original; internal citations omitted).

Illegal Take of Chinook Salmon and Steelhead and Bull Trout:

Electron has caused and continues to cause illegal take of Chinook salmon and steelhead and bull trout in the Puyallup River by, among other things, these actions:

> (1) Electron diverts water from the river into a flume, and thereby collects, captures, harms, and harasses Chinook salmon and steelhead and bull trout in that water;
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> (2) Electron maintains and periodically dredges Lizard Lake, and thereby collects, captures, harms, and harasses Chinook salmon and steelhead and bull trout there;
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> (3) Electron maintains a forebay where it collects, captures, harms, harasses and kills Chinook salmon and steelhead and bull trout, in

part by operating facilities that create turbidity and other water quality impacts that harm salmonids;

(4) Electron nets or otherwise physically captures and collects Chinook salmon and steelhead and bull trout in the forebay, causing harm, harassment, injury, and death to Chinook salmon and steelhead and bull trout;

(5) Electron maintains and operates the forebay, where fish prey on Chinook salmon and steelhead and bull trout, and delay their migration;

(6) On July 29, 2020 Electron drained the forebay and failed to implement any reasonable efforts to save the fish in the forebay, causing documented fish mortality and fish injury;

(7) Electron placed artificial turf in the river on or around July 27, 2020, where it remains today, that discharged and continues to discharge crumb rubber and plastics throughout over 40 miles of river and into Commencement Bay that has interfered with essential life cycle elements of listed fish species such as feeding, breeding, migration, and rearing;

(8) Electron diverts water from the Puyallup River and thereby causes insufficient flows in the bypass reach to fully support the life histories of Chinook salmon and steelhead and bull trout, and thereby harms and harasses them; and

(9) Electron plans to install, without any required permits, a rock dam and put 8500 cubic feet of angular large rock in the river as a "fix" for other permit violations that will harm, harass, collect, capture, injure, kill, delay migration, and interfere with reproduction, feeding, and other essential life cycle elements.

The placement of the rock is imminent in the near future, and prior to the expiration of the 60 days notice provided herein. The placement of the rock will cause irreparable and unmitigable harm to listed species. The placement of the rock will also lead to further intake of fish into the forebay, which will lead to harassment, harm, and further fish mortalities. This take is unmitigable. The placement of the rock is an action that constitutes an emergency and warrants immediate relief to prevent further take of listed species.

Electron may obtain immunity from its actions causing "take" of these listed species only if it has obtained an Incidental Take Permit ("ITP") from NMFS and/or the Service. 16 U.S.C. § 1539(a)(1)(B) or if it had, as part of any permits for these activities, consulted with the National Marine Fisheries Service or US Fish and Wildlife Service pursuant to 16 U.S.C. § 1536. In order

to obtain an ITP, Electron must submit a conservation plan that specifies the extent of take and the steps Electron proposes to take to minimize that take. Electron has not obtained an ITP, and has delayed the HCP development for years. Similarly, Electron has no permits for the placement of the artificial turf in the river or any continued work at the site, and, therefore, has not consulted with the Services on those actions. All work after August 7, 2020 is unpermitted and has not received any coverage under the Endangered Species Act and is, therefore, a take of listed species as described above.

Summary:

This letter serves as the Puyallup Tribe's notice of intent to sue Electron under the ESA for the violations described above. 16 U.S.C. § 1540(g)(2). The Puyallup Tribe anticipates that during the 60-day period when Electron considers this notice, and before the Puyallup Tribe files any lawsuit, Electron may wish to meet and confer as to its position as to these matters. However, the Puyallup Tribe cautions that the upcoming work on the river in constructing a new and wholly unpermitted rock dam structure may constitute an emergency requiring immediate action and injunctive relief. Please contact us immediately if you plan to proceed with this work. If you do not inform the Tribe and the responsible permitting agencies by October 7, 2020 that you no longer intend to construct the unpermitted rock dam, we will assume you will be moving forward with that work. The Puyallup Tribe is represented by counsel in this matter:

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Lisa.Anderson@puyalluptribe-nsn.gov
(253) 320-8285

Please contact Ms. Anderson if Electron is interested in meeting, or if it has questions or concerns about this notice of intent to sue. Thank you for your time and consideration.

Sincerely,

Bill Sterud

Bill Sterud, Chairman
Puyallup Tribal Council

Copies to:

Thom Fischer, Registered Agent for Electron Hydro LLC, Electron Management LLC and Tollhouse Energy
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Law Offices of Gene R. Moses, P.S., Registered Agent for Electron Holdings, Inc.
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